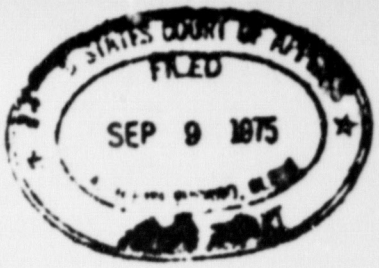
United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF



75-7280

IN THE

United States Court of Appeals

For The Second Circuit

RAMSEY CLARK and CHANDRA CARR,

Plaintiffs-Appellants,

against

ALEX ROSE, DONALD SZANTHO HARRINGTON, THE LIBERAL PARTY OF THE STATE OF NEW YORK, THE STATE EXECUTIVE COMMITTEE, JACOB R. JAVITS and ARTHUR H. SCHWARTZ, REMO J. ACITO, WILLIAM H. McKEON and DONALD RETTALIATA as members of the State Board of Elections,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES ROSE, HARRINGTON, THE LIBERAL PARTY OF THE STATE OF NEW YORK AND THE STATE EXECUTIVE COMMITTEE

HERZFELD & RUBIN, P.C.
Attorneys for Defendants-Appellees Rose, Harrington, The Liberal Party of the State of New York and the State Executive Committee
40 Wall Street
New York, New York 10005

Of Counsel
HERBERT RUBIN
EDWARD L. BIRNBAUM

B
P/S

3

TABLE OF CONTENTS

	Page
Statement of Facts	1
Prior Proceedings	1
The Facts	5
POINT I - Plaintiffs lack any standing to sue ...	8
POINT II - The court below was correct in dismissing the action on the ground that there was no reason or basis to perceive that the statute had been applied in an unconstitutional manner	10
Conclusion	17

Table of Cases Cited

Fair v. Dekle, 367 F.2d 377,378 (5th Cir. 1966)	10
Goosby v. Osser, 409 U.S. 512 (1973)	11
Ingersoll v. Heffernan, 188 Misc. 1047 (Sup. Ct. N.Y. 1947) affd. 297 N.Y. 524 (1947)	15
Marchand v. Director U.S. Probation Office, 421 F.2d 331 (1st Cir. 1970)	10
Matter of Intersoll v. Curran, 188 Misc. 1003 (Sup.Ct. Albany 1947) aff'd 297 N.Y. 522 (1947)..	15
Matter of Powers v. Donohue, 297 N.Y. 521 (1947).	16
Matter of Sipser v. Heffernan, 297 N.Y. 526 (1947)	16
Matter of Werbel v. Gernstein, 191 Misc. 275 (Sup. Ct. Kings 1948)	16

Page

McFaddin Express, Inc. v. The Adley Corporation, 346 F.2d 424 (2d Cir. 1965)..... 14

Rosario v. Rockefeller, 410 U.S. 752 (1973) ... 16

Storer v. Brown, 415 U.S. 724 (1974)..... 16

Warrington Sewer Co. v. Tracy, 463 F.2d 771 (3rd Cir. 1972) 14

Yevoli v. Christenfeld, 37 A.D. 2d 153 (2d Dept. 1971) 16

Table of Statutes Cited

New York Election Law

Section 13 7,16

Section 131 (2) (b) (1) 9

Section 131 (2) (b) (3) 9

Section 136 (4) 9

Section 137 (Wilson-Pakula Act) 1,2,4,7,8

Section 137 (4) 9,13

Section 148 15

Section 236 (5) 6

Section 270 12

Table of Other Authorities Cited

Federalist #52 14

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RAMSEY CLARK and CHANDRA CARR,

Plaintiffs-Appellants,

-against-

ALEX ROSE, DONALD SZANTHO HARRINGTON, THE LIBERAL PARTY OF THE STATE OF NEW YORK, THE STATE EXECUTIVE COMMITTEE, JACOB R. JAVITS and ARTHUR H. SCHWARTZ, REMO J. ACITO, WILLIAM H. MCKEON and DONALD RETTALIATA as members of the State Board of Elections,

Defendants-Appellees.

BRIEF FOR APPELLEES ROSE, HARRINGTON, THE LIBERAL PARTY OF THE STATE OF NEW YORK AND THE STATE EXECUTIVE COMMITTEE

Statement of Facts

Prior Proceedings

Plaintiffs' complaint was brought to set aside the Liberal Party designation of Jacob Javits as its candidate for Senator in the 1974 General Election. The Complaint challenges the waiver provisions of the Wilson-Pakula Law (N.Y. Election Law, §137). Under that statute only enrolled members of a party may be candidates in a party primary or general election except where waiver is granted in accordance with the statute. New York Election Law §137 reads

as follows:

"§137. Limitation on the right to designate or nominate party candidates. 1. No petition for the purpose of designating any person as a candidate for party nomination at a primary election shall be valid unless the person so designated shall be enrolled as a member of the party referred to in said designating petition at the time of the filing of the petition.

2. No nomination made by any committee of a political party shall be valid unless the person so nominated was enrolled as a member of such party at the time of the filing of the certificate of nomination, provided, however, that such restriction shall not apply to the nomination or designation of a candidate for statewide judicial office made by a state committee in the nomination procedure prescribed in section one hundred thirty-one.

3. No party designation or nomination made by a committee to fill vacancies, and no party nomination made for an office to be filled at a special or general election by reason of a vacancy existing in such office, shall be valid unless the person so designated or nominated shall be an enrolled member of the political party referred to in the certificate of substitution or of nomination at the time of filing of such certificate.

4. Notwithstanding the provisions of subdivisions one, two and three of this section, at a meeting of the members of the party committee representing the political subdivision of the office for which a designation or nomination is to be made, or of such other committees as the rules of the party may provide, except

> as hereinafter in this subdivision provided with respect to certain offices in the city of New York by a majority vote of those present at such meeting provided a quorum is present, such committee may authorize the designation or nomination of a person as candidate for any office who is not enrolled as a member of such party as provided in this section. In the event that such designation or nomination is for an office to be filled by all the voters of the city of New York, such authorization must be by a majority vote of those present at a joint meeting of the executive committees of each of the county committees of the party within the city of New York, provided a quorum is present at such meeting. The authorization to file the designating petition, the certificate of nomination and the certificate of substitution shall be filed not later than four days after the last day to file such designating petition, certificate of nomination or certificate of substitution. The certificate of authorization shall be signed and acknowledged by the presiding officer and the secretary of the meeting at which such authorization was given. * * *"

The first cause of action alleges the statute is unconstitutional on its face in that it deprives plaintiffs and others of the equal protection of the laws and other constitutional rights with respect to the election of a United States Senator. The second cause of action alleges that the defendant Rose and other Liberal Party leaders so controlled the party that they prevented plaintiff Clark from seeking the nomination of the Liberal Party for the United States Senate in violation of his equal protection rights (2a-7a).

The relief sought in the complaint was a judgment: (1) declaring the waiver provisions of the Wilson-Pakula Law unconstitutional; (2) declaring that the conduct of the Liberal Party defendants was wrongful and deprived plaintiffs and others of equal protection of the laws and other Federally protected rights; and (3) enjoining all the defendants from taking any actions to process the Liberal Party designation of defendant Javits (2a-7a).

On plaintiffs' motion, before Judge Harold Tyler, a three-judge court was impaneled. After hearing, that Court held that the Wilson-Pakula Law under which defendant Javits was designated as the Liberal Party's candidate for U.S. Senator, is constitutional. The Court also declined to restrain the State Board of Elections from processing the designation of defendant Javits by the Liberal Party as its candidate for U.S. Senator (53a-67a). The decision is reported in 379 F. Supp. 73.

In its decision, the Court found "the statute works neither a denial of equal protection of the laws nor a denigration of the right to vote as protected by the First and Fourteenth Amendments" (379 F. Supp. 73, 78).

Upon the failure of plaintiffs after the elections to discontinue the action, a conference was

called by Judge Tyler. Plaintiffs' counsel at that time refused to discontinue the action. It was contended that there was an unresolved issue to wit: the alleged unconstitutional application of the Statute by the State Committee of the Liberal Party.

Upon motion by the various defendants to dismiss the complaint, Judge Tyler dismissed the complaint for the reasons set forth in his memorandum decision (86a-89a).* This appeal is from the judgment entered on that decision.

The Facts

Plaintiff Clark is an enrolled member of the Democratic Party who sought the nomination of the Liberal Party for U.S. Senator in the 1974 elections (3a). Plaintiff Carr was an enrolled member of the Liberal Party and a duly elected State Committee district leader of the 62d Assembly District during 1974 (3a).

The State Committee was duly convened on June 15, 1974 (46a). When nominations were called for the office of Senator, equal time was allowed to the speaker and seconder of each nominee. Three persons, none of whom

*The action was dismissed by consent as to defendant Javits.

were enrolled Liberals, were placed in nomination: Javits a Republican, Clark a Democrat and Lowenstein, a Democrat (47a). After the vote which is reported below, Merrill, a supporter of Clark, moved that the Committee authorize as a candidate in the primary any nonenrolled Liberal who secured petitions in the number required by Election Law, §236(5). The motion was defeated by a vote of 180 to 19 (47a-48a).

The three-judge court states the facts as follows:

> "As all parties concede, Clark unsuccessfully sought to receive the majority vote of the State Committee of the Liberal Party at its meeting on June 15, 1974. At that meeting, the Committee considered and voted on three nominations of non-party candidates for the office of Senator. Javits received 85.7% of the votes cast, Clark received 8.8% and another candidate, also an enrolled Democrat, received 3.4%. Since Clark received less than twenty-five percent of the votes cast, he was ineligible under §§131(2)(b)(3) and 137(4) of the Election Law, to seek authorization to run in the Liberal Party primary on September 10, 1974, based on the results of the State Committee meeting.
>
> Clark, moreover, has not attempted to secure the petitions required under §136(5). Indeed, by July 15, 1974, it was too late to do so. Plaintiffs have argued that it would have been futile for Clark to have pursued this route since, even if he had secured the requisite number of petitions, the State Executive Committee would refused to authorize his candidacy in the primary. They point out that at the June

> 15 meeting, a resolution was defeated which would have provided that any non-member candidate who could comply with the provisions of §136(5) would automatically receive the required authorization to run in the Liberal Party primary. That denial of a blanket authorization, however, does not appear to have been aimed specifically at Clark. We, therefore, are left to speculate whether or not, had he thereafter obtained the number of signatures of the Liberal Party members required to comply with §136(5), his request for authorization would have been viewed more favorably by the State Executive Committee. For these reasons we have been troubled by the possibility that Clark lacks standing to urge that subdivision (4) of the statute is unconstitutional. (Citation omitted). Similarly, we have considered that Carr also may lack standing to attack the authorization provision since Clark, for want of the twenty-five percentum vote, or a valid designating petition, was not qualified to receive authorization" (57a-59a).

The Liberal Party State Committee consists of more than 300 persons elected as provided by New York Election Law, §13 (76a). The Liberal Party State Executive Committee, likewise is constituted under the Election Law (76a), and is broadly representative of the State Committee. It consists of 9[illegible] of the members of the State Committee. After Javits' nomination by the State Committee, the Executive Committee duly authorized Javits under the Wilson-Pakula Law to run on the Liberal Party line.

Plaintiffs recklessly indulge in charges of control, manipulation and denial of access to the

Liberal Party voters or its State Committee, yet, the identity of all these persons is a matter of public record. To charge that respondents in any way barred plaintiffs from access to the voters or the State Committee evidences the bankruptcy of plaintiffs' claim. No charge is made of a single irregularity in the convening or conduct of the State Committee meeting. Indeed the evidence is clear that the proceeding was conducted with scrupulous fairness and punctilious respect for the right of all persons to a hearing before the convened body(77a).

Clark made no effort to solicit petitions either before or after June 15 or to appeal the three-judge court decision of July 15. He appeared on the ballot as a Democraft and was defeated in the election. Yet, he pursues this action which he had brought to set aside the designation of Javits, claiming that the Wilson-Pakula Act is unconstitutional as applied by the Liberal Party.

POINT I

PLAINTIFFS LACK ANY STANDING TO SUE

The three-judge court, though dubious as to plaintiffs' lack of standing to sue, rested its decision on other grounds. Citing Storer v. Brown, 415 U.S. 724, that Court at 379 F. Supp. 73 at pages 75-76, noted it was "troubled by the question of lack of standing". The absence of standing by plaintiffs, however, is a complete

bar to this action.

Plaintiffs' lack of standing arises from conceded facts. The failure by the Liberal Party or its State Committee to authorize a nonparty member to run in the party primary election cannot be challenged unless one of the three conditions precedent for such authorization take place.

Unless a nonparty member is (1) approved as the party candidate by the State Committee (N.Y. Election Law §131(2)(b)(1) or (2) receives a 25% votes of the State Committee (N.Y. Election Law §131(2)(b)(3) or (3) obtains and files petitions of at least 20,000 members or 5% of the registered party members (Election Law §136(4)) whichever is less, the party, its State Committee and its Executive Committee have no occasion to consider under N.Y. Election Law §137(4) whether he should be authorized to run in the party primary. In this case none of these conditions had occurred.

The District Court, after the decision by the three-judge court, concludes (87a):

> "Particularly now that the 1974 senatorial election in New York has been held and decided, I believe, as did the three-judge panel (see 379 F.Supp. at 75-56), that there is considerable doubt that either plaintiff has standing to attack §137."

The court's conclusion of lack of standing is obviously well founded and should end further consideration of this case.

As stated in Fair v. Dekle, 367 F.2d 377, 378 (5th Cir. 1966), "The issue posed should be real and substantial and not merely academic and speculative." See also Marchand v. Director, U.S. Probation Office, 421 F.2d 331 (1st Cir. 1970). Since as to these plaintiffs no real or substantial issue is present, the proceeding should be dismissed.

POINT II

THE COURT BELOW WAS CORRECT IN DISMISSING THE ACTION ON THE GROUND THAT THERE WAS NO REASON OR BASIS TO PERCEIVE THAT THE STATUTE HAD BEEN APPLIED IN AN UNCONSTITUTIONAL MANNER

The attempt to assert a continuing issue as to constitutionality in application of the statute as distinguished from facial constitutionality is likewise without merit.

The court below points out (88a):

> "As a practical matter, however, the statutory court of which the undersigned was a member was aware of the conceded facts of candidate Clark's attempts to persuade the Liberal Party to designate him under the

> Wilson-Pakula Law. Under those conceded facts, the panel could see no constitutional infirmity in the statute on its face, and so held. Further, though it was unnecessary to so decide, this member of the panel, who was the writer of that opinion, could conceive of no reason or basis to perceive that §137 had been applied in an unconstitutional manner vis-a-vis plaintiffs. Thus, in effect, as defendants now argue, the statutory court really decided all of the issues in this case. Concededly, counsel for plaintiffs has made an ingenious effort to cast up all kinds of 'issues' and factual inquiries which he says should be considered by the court consisting of one judge * * * But as I read and understand the ingenious list of factual inquiries set forth by counsel, it amounts to a general rummage of irrelevant historical facts and statistics which have nothing to do with the present interests of former candidate Clark and Chandra Carr as a member of the Liberal Party of New York."

There is no real question but that all the issues had been decided. If plaintiffs were dissatisfied with the decision, their recourse was to appeal. Their failure to proceed with a timely appeal precludes further consideration of those issues. Goosby v. Osser, 409 U.S. 512 (1973). No basis exists to continue this case for what the court characterizes as "a general rummage of irrelevant historical facts and statistics which have nothing to do with the present interests of former candidate Clark and Chandra Carr as a member of the Liberal Party of New York." (89a).

That the relevant facts were clear and undisputed is confirmed by the colloquy between Judge Mansfield and plaintiffs' counsel which appellant quotes at page 6 of its brief. Judge Mansfield asks whether there are any disputed issues of fact material and relevant to the question of constitutionality. Counsel answers in the negative (31a).

Indeed, no other answer was possible. The following, therefore, are uncontested:

1. The Liberal Party State Committee had been duly convened June 15, 1974.

2. The members of the State Committee, having been duly elected in accordance with the New York Election Law, their names and addresses were public records (See Election Law §270), and access to them, as to any elected official, was fully available to plaintiffs.

3. At the State Committee meeting, all members seeking to be recognized were recognized. All nominations and seconding speeches were given equal time. There is no challenge to the fairness of the voting process in which Clark received only 8.8% of the votes against 85.7% for Javits (74a).

4. Although Clark had ample opportunity under the statute to seek nomination by petition, he took no measures to avail himself of his rights.

5. The State Executive Committee, consisting of 94 members of the more than 300 member State Committee, acting as permitted by law, duly authorized the waiver as to Javits under New York Election Law §137(4).

6. All the rights of plaintiffs were punctiliously honored(77a).

There is no factual issue urged by appellant which has any reality. The period for soliciting signatures for petitions, unchanged over the years, from voters whose names and addresses are public records, raises no colorable question. Nor is it permissible for appellant to argue that the Wilson-Pakula Law has validity to avoid party raiding or confusion of voters as to other political parties but is inapplicable to the Liberal Party (App. Brief, pp. 13-14).

Particularly incomprehensible is appellant's speculation as to whether the State Committee, a body constituted and elected under the Election Law and endowed with legislative functions, "reflects the views of the Liberal Party members." (App. Brief, p. 14).

Not only is the speculation unfounded, it is irrelevant. An elected representative does not cast his vote

simply by ascertaining the most popular view among his constitutents. He is accountable by periodic election to those who select him, but he is not a poll taker.

As stated in Federalist #52:

> "No man can be a competent legislator who does not add to an upright intention and a sound judgment a certain degree of knowledge of the subjects on which he is to legislate."

Judge Tyler was perhaps unduly patient in describing these issues as ingenious but irrelevant (88a).

As this court held in McFaddin Express, Inc. v. The Adley Corporation, 346 F.2d 424 (2d Cir. 1965) in affirming a dismissal for lack of federal jurisdiction (page 427):

> "As has recently been written, where the Federal element which is the basis for jurisdiction is disposed of early in the cases, as on the pleadings, it smacks of the tail wagging the dog to continue with a Federal hearing of the state claim."

Similarly appropos is the comment of the court in Warrington Sewer Co. v. Tracy, 463 F.2d 771(3d Cir. 1972) at 772 stating:

> "There is no genuine and present controversy with respect to the Fourteenth Amendment claimed. A bare allegation of violation of the due process clause of the Fourteenth Amendment is not sufficient to confer Federal jurisdiction."

Appellant lamely protests that the court's

"unwarranted assumptions" (App. Brief p. 12-14) deprived it of an opportunity to develop relevant facts.

Attack first is made on the "assumption" of the three-judge court that appellant under Election Law §148 could have obtained write-in votes if 20,000 or five percent of the enrolled voters signed his petition. This "assumption" is attacked because of the claimed unrealistic time to secure signatures and lack of cooperation of the party leadership. Cooperation of the leadership, however, was irrelevant since names and addresses of enrolled voters are all matters of public record. Furthermore, the 20,000 or five percent formula has been applicable to all parties over many years. The charge that this number was unrealistic is sheer rhetoric. The numbers and time frame referred to in Storer v. Brown, supra, are so vastly different as to permit no comparison of the two cases.

The second "assumption" of the three-judge court which was attacked was its finding that without the Wilson-Pakula Law there was a potential for voter confusion. The proposition is not only self evident but is the rationale of the state court decisions which sustained the statute as a valid device to avoid the raiding of parties by outsiders. See Ingersoll v. Heffernan, 188 Misc. 1047, (Sup. Ct. N.Y. 1947), aff'd. 297 N.Y. 524 (1947); Matter of Intersoll v. Curran, 188

Misc. 1003 (Sup. Ct. Albany 1947), aff'd. 297 N.Y. 522 (1947); Matter of Powers v. Donohue, 297 N.Y. 521 (1947); Matter of Sipser v. Heffernan, 297 N.Y. 526 (1947); Yevoli v. Christenfeld, 37 A.D. 2d 153 (2d Dep't 1971); Matter of Nerbel v. Gernstein, 191 Misc. 275 (Sup. Ct., Kings County 1948).

The third "assumption" of the three-judge court which appellant challenges is that the State Committee is elected in a way to insure that it "accurately reflects the views of the Liberal Party members" (App. Brief, p. 14). Appellant's attack is apparently on the provisions of the Election Law governing the election of the State Committee (§13). These provisions have little relevance to the allegations of plaintiffs' complaint.

Also attached is the reference of the three-judge court to the need for the party to put up candidates that "best reflect their party's philosophy and views." It is apparent that appellant is attacking not the decision of Judge Tyler but that of the three-judge court from which he failed to take an appeal. Moreover, despite his protestations, in large measure he is attacking the face of the statutes rather than its "application."

Rosario v. Rockefeller, 410 U.S. 752 (1973) and Storer v. Brown, 415 U.S. 724 (1974) have demonstrated the

importance of state protection of the integrity of its political processes. Appellant's central argument to which it inevitably returns is that the statute under attack does not reflect compelling state interests (App. Brief, p. 17-24). Its appeal is thus nothing more than a belated and impermissible appeal from the decision of the three-judge court.

The court below found appellant's arguments singularly lacking in merit. For the reasons set forth in the opinions below, the decision should be affirmed and the complaint dismissed.

CONCLUSION

The decision below should be affirmed.

Dated: New York, N.Y.
September 8, 1975

Respectfully submitted,

HERZFELD & RUBIN, P.C.
Attorneys for Defendants-Appellees
Rose, Harrington, The Liberal
Party of the State of New York
and The State Executive Committee
Office & P. O. Address
40 Wall Street
New York, New York 10005
(212) 344-0680

OF COUNSEL:

Herbert Rubin
Edward L. Birnbaum

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.

AFFIDAVIT OF
SERVICE BY MAIL

Frank J. O'Regan, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age, and resides at 14 St. Johns Avenue, Hicksville, New York; that on the 9th day of September, 1975, deponent served two copies each of the within APPELLEES' BRIEF upon the following attorneys for the parties shown below at the addresses set forth, being the addresses designated by said attorneys for that purpose, by depositing a true copy of the same enclosed in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States post office department within the State of New York

LEON FRIEDMAN, Esq.
Attorney for Appellants
HOFSTRA UNIVERSITY
SCHOOL OF LAW
HEMPSTEAD, NEW YORK 11550

LOUIS J. LEFKOWITZ
ATTORNEY GENERAL OF THE STATE OF NEW YORK
Attorney for Appellees, Members of New
York State Board of Elections
2 WORLD TRADE CENTER
NEW YORK, NEW YORK 10047

Frank J. O'Regan
Frank J. O'Regan

Sworn to before me this
9th day of September, 1975

Doris B. Weiss

DORIS B. WEISS
Notary Public, State of New York
No. 41-2308200 - Qualified in Kings County
Commission Expires March 30, 1977